Appendix

CALIFORNIA UNFAIR PRACTICES ACT

(Stats. 1935, ch. 477, p. 1546; Amended by Stats. 1937, ch. 860, p. 2395; Stats. 1939, ch. 175, p. 1424; transferred by Stats. 1941, ch. 526, p. 1847, to Business and Professions Code.)

An act relating to unfair competition and discrimination, defining certain unfair and discriminatory practices, including loss leader selling and selling below cost, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this act a misdemeanor and providing penalties.

The People of the State of California do enact as follows:

Sec. 1.* * * * * * * * *

Sec. 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation, shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

Sec. 3. It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, and he shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

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*Sec. 1 is not material; it relates to discrimination. It was first enacted in 1913 as the "Anti-discrimination Act" (Stats. 1913, p. 508), and amended in 1931 (Stats. 1931, p. 1333) and 1933 (Stats., pp. 793, 1280. The provisions on below-cost selling were added in 1935, and the Act was renamed the "Unfair Practices Act."

The term "cost" as used in this act as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" as used in this act is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

The prohibitions of this act shall be deemed among the other purposes and objects of the act to also prohibit the practice of using any article or product as a "loss leader." Loss leader, as used herein, shall mean any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors.

The prohibitions of this section shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby a sale below cost is effected in violation of the spirit and intent of any of the provisions of this act.

Sec. 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the

replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

"Ordinary channels of trade" shall mean those ordinary, regular and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another, and shall not include sales of bankrupt stocks, closeout goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever; provided that this last listing herein shall not be held to be all-inclusive but as example only.

Sec. 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof

of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition.

Sec. 6. The provisions of sections 1, 3, 4 and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area and in the ordinary channels of trade as herein defined; . . .

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Sec. 7. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act.

Sec. 8. (Repealed, 1937.)

Sec. 9. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of sections 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 10. Any person, or any trade association, may bring and maintain an action, or actions, to enjoin and restrain any violation, or violations, of any provision, or provisions, of this act and, in addition thereto, for the recovery of damages. If it shall appear to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary injunction should not be issued, or upon the hearing of any motion for a preliminary injunction, or if the court shall find, in any such action, that any defendant therein is violating, or has violated, any provision of this act, then the court must and shall enjoin such defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by such defendant; . . . It shall not be necessary for the plaintiff, in any such action, to provide nor file any undertaking or bond for the issuance of any such interim or final injunction.

In any such action, it shall not be necessary to allege nor prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover the amount of the actual damages, if any, sustained by such plaintiff, as well as the actual damages, if any, sustained by any person who has assigned his claim for damages to such plaintiff, which said damages are the result of any violation, or violations, of any provision, or provisions, of this act.

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Sec. 11. Any person, whether as principal, agent, officer or director, for himself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any

of the provisions of sections 1 to 7, inclusive, of this act is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, shall be presumptive evidence of cost as to each such article or product involved in any action brought under this act and involving the violation of any provisions of sections 3 and 5 of this act.

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Sec. 13. The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

Sec. 14. This act shall be known and designated as the "Unfair Practices Act."

Sec. 15. (a) In any action brought under the provisions of section 3 hereof where it is alleged and shown that the person complained against is selling below his cost of doing business, and said person is including labor at less than the prevailing wage scale in the trade in which such person is engaged for the locality or vicinity in which he is doing business, evidence of such prevailing wage scale shall be admissible to prove the intent or purpose of such person to violate the provisions of this act.

In any action brought under the provisions of this act, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this act, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered.

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Sec. 16. As used in this act, the term "person" includes any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation; the term "sell" includes selling, offering for sale or advertising for sale; the term "give" includes giving, offering to give or advertising the intent to give; the term "article or product" includes any article, product, commodity, thing of value, service or output of a service trade.

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